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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 210 /O.

STATE OF SOUTH CAROLINA

vs.

UNITED STATES.

SUPPLEMENTAL BRIEF.

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While little remains to be added to the excellent brief already presented in this case on behalf of the State of South Carolina by Mr. Franklin H. Mackey (now deceased), the undersigned desire to submit as briefly as may be a view of the case which has strongly impressed them as being correct, and which, if well founded, presents a narrow issue, upon which the whole case may be disposed of.

It is not the purpose of the writers, before entering upon this particular view, to amplify to any great extent the positions taken by Mr. Mackey, but they insist that they are not required to discuss or will it be necessary for the court to consider whether the institution of dispensaries in the State of South Carolina was an exercise of the police powers of the State or was so purely commercial in character as to make the State treating the liquor question in this fashion a common commercial trader.

In a few words, we may say, however, that in our view the dispensary system of South Carolina comes well within the police powers of the State, for if a State may take a perfectly worthless piece of paper and, by stamping certain arrangements of words and figures upon it, sell that paper as a license to an individual to carry on the liquor business, making thereby a direct profit of an infinitely large per cent., it does no act differing in any degree in principle if, instead of selling such paper carrying with its possession a privilege, it sells the liquor itself. In either event, the object, the prime object, is to control within certain fixed limits the traffic in an article, the excessive use of which is confessedly an evil, and it may not be said that because under one system or the other a profit arises to the State, therefore the police powers of the State are being improperly exercised for commercial ends.

As bearing upon this point, the writers cannot do better than quote the language of Chief Justice Taney in the License cases, 5th Howard, page 583, to the following effect:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty; the power to govern men and things within the limits of its dominions. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its authority to pass health laws, except in so far as it has been restricted by the Constitution of the United States. * * * Upon this question, the object and method of the State are of no importance, and cannot influence the decision. It is a question of power."

But in the judgment of the undersigned this particular question was placed beyond argument by the decision of the

court in Vance *vs.* W. A. Vandercook Co., 170 U. S., 444, holding that—

"Beyond dispute, the respective States have plenary power to regulate the selling of intoxicating liquors within their borders, and the scope and extent of such regulations depend wholly on the judgment of the law-making power of the States; provided, always, they do not transcend the limits of State authority by invading rights which are secured by the Constitution of the United States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other States of the Union."

And in the same case, on page 447, it is said:

"From the fact that the State law permits the sale of liquor, subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State."

We are therefore justified in saying broadly and absolutely, as we believe, that the Supreme Court has recognized, in the case last cited, the South Carolina dispensary law as being a proper exercise of the police power.

It remains, therefore, to consider whether the United States has a right to interfere with the exercise by a State of its sovereign police power by the levying of a tax upon the instrumentalities used by it and whether in fact it has undertaken to levy such a tax. That it cannot tax the instrumentalities through which a State exercises its sovereignty has, as it seems to us, been a closed question since the case of Collector *vs.* Day, 11 Wallace, 113, if indeed we might not say since the decisions upon which that case was rested; and if the United States may, by a tax upon one exercise of the right of sovereignty, limit or destroy it, so may it, with equal right, limit or destroy every other exercise of sovereignty, and thus enfeeble or extinguish the autonomy of the States.

That the tax in this case was collected from the State of South Carolina and its instrumentalities is perfectly evident

from a review of the findings of the Court of Claims, which are particularly full upon this point.

The Court of Claims found that "the United States collector of internal revenue for the district of South Carolina has required the State dispensary commissioner and the county dispensers * * * to pay a special tax," etc.

It also found (third finding) that the State dispensary commissioner had drawn his warrant annually upon the State treasurer in favor of the collector for the special taxes claimed and demanded by him.

In its fourth finding, it found that such warrants were paid by the State treasurer to the collector, and by him paid into the Treasury of the United States.

According to its fifth finding, all the liquor sold by the dispensary agents during the years mentioned in its opinion was the property of the State of South Carolina, and all the profits and losses arising from said sales accrued to the said State; that the dispensers never have had any proprietary interest of any sort in the liquor sold or in the profits derived therefrom.

In its eighth finding it was declared that there was established in the city of Columbia a wholesale department where all liquors purchased by the State commissioner were kept and from which the various retail dispensers received their supplies, but that neither the State commissioner nor the dispensers had any property interests therein, the same being the property of the dispensary system.

According to its eleventh finding the payments made for special license taxes were sometimes made to the United States internal-revenue collector in cash and sometimes by warrant, the form of the warrant being set out and showing that it was paid under the State dispensary account and receipted for by the collector for business carried on at specified dispensaries.

We now come to the important question as to whether—granting, *arguendo*, that we are entirely wrong in the position

so far taken—the internal-revenue laws by their terms apply to the sovereign States of the United States.

In approaching this point we insist upon the relevancy of the expression of Blackstone (1 Comm., p. 261) as to the powers of the King, and, as far as may be, apply it to a Federal State:

"The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate, etc.') affect not him in the least if they may tend to restrain or diminish any of his rights or interests. * * * Yet when an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the King as upon the subject, and, likewise, the King may take the benefit of any particular act, though he be not especially named."

We also remember that when the internal-revenue law was enacted no State regulated the liquor traffic as South Carolina now does, and Congress did not, therefore, have it in mind to, and, as we shall argue, did not, frame a law to apply to States.

Section 3140 of the Revised Statutes originally read as follows:—

"The word 'State' when used in this title shall be construed to include the Territories and the District of Columbia where such construction is necessary to carry out its provisions."

By the act of February 27, 1877, the following definition of the word "person" was added to the foregoing section:

"And where not otherwise distinctly expressed or manifestly incompatible with the intention thereof, the word 'person' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

When Congress undertook to define, as it did in 1877, the word "person" to "mean and include a partnership association, company, or corporation, as well as a natural person," it necessarily excluded everything beyond the things necessarily included, and excluded therefore everything which was not a business association of natural persons, and we therefore invoke the principle *inclusio unius est exclusio alterius*.

It would have seemed natural that if Congress had intended the title "internal revenue" to apply to States, as well as to individuals, either singly or in association, the desire should have been expressed when the word "State" was defined, or if not then, at least when the word "person" was defined as including, among other things, corporations. If, however, so far as the text is concerned, we are to find in it authority extending the internal-revenue laws over States, it must be either because States are "persons" or "corporations."

Is a State a person within the sense of the internal-revenue law? We shall waive for the moment discussion of the various features of the law, which to our mind conclusively establish that a State never was considered by Congress to be a person in this sense, and confine ourselves to the general course of decisions.

It is true that for the purpose of effectuating justice and sustaining the jurisdiction of courts, States have been held to be persons (Republic of Honduras *vs.* Soto, 112 N. Y., 310; Martin *vs.* The State, 24 Texas, 61), but this is not the ordinary or legal interpretation of the word. In fact, referring to the New York statute of descents, the Supreme Court (U. S. *vs.* Fox, 4 Otto, 315) held that:

"The term 'person' as here used applies to natural persons and also to artificial persons—bodies politic, deriving their existence and powers from legislation—but cannot be so extended as to include within its meaning the Federal

Government. It would require an express definition to that effect to give it a sense thus extended."

(See also McBride *vs.* Pierce County Commissioners, 44 Federal, 17.)

It was argued on behalf of the Government in the Court of Claims that the Supreme Court in Salt Lake City *vs.* Hollister, 118 U. S., 256, held Salt Lake City to be a person within the meaning of the revenue laws. This, we think, was a clear error. The Supreme Court treated Salt Lake City as a corporation throughout the whole opinion. We need not argue the difference between a corporation like this, created by the authority of Congress itself, and a State.

We are not unmindful of the fact, also, that for the purpose of maintaining covenants of warranty a different rule of interpretation has been followed (West Coast Manufacturing Co. *vs.* West Coast Improvement Co., 25 Wash., 667; 62 L. R. A., 763), but such decisions given to sustain private rights have no place in this discussion.

But is a State a corporation? We will not repeat the argument of Mr. Mackey, but again call attention to State o Georgia *vs.* Atkins, 35 Georgia, 315, quoted with approval by the Supreme Court in U. S. *vs.* Railroad Co., 17 Wall., 322, demonstrating that a State is not a corporation within the meaning of the revenue laws.

We do not at this time trouble the court with a repetition of the cases cited in the brief of Mr. Mackey tending to demonstrate that States do not come within the internal-revenue laws of the United States.

A State is more than a person. It is more than a corporation. It is a constituent part of the United States and surely at least as important as firms, associations, and corporations expressly enumerated in the statutes.

A State is a sovereign power; itself the creator of corporations, while it may fairly be argued that when the statute enumerated "partnership, association, company or corpora-

tion, as well as a natural person," the law-maker had in mind individuals or associations of individuals gathered together solely for business convenience, and not a sovereign power. There is a natural relation between partnerships, associations, companies, corporations, and natural persons. The State is not one with them, but above and beyond and controlling them. To read into the act the word "State" would be to read in a word having no logical association with the other words of the act, everything considered.

In interpreting the statute, therefore, we confidently appeal to the doctrine expressed by the words *noscitur a sociis*, as approved by this court in Arthur *vs.* Moller, 7 Otto, 365.

But let us approach the matter from another point of view. It seems to the writers that without certainly the clearest intention on the part of Congress a State should not be placed within the terms of a revenue act—an act which in many of its features approaches a branch of the criminal law. It cannot naturally be the case that a State is to be hunted down for violation of law nor its representatives confined in jail because of failure to meet requirements of a statute. Such a theory, we repeat, could only be justified by the strongest and clearest possible language in the act.

Let us now see if the Revised Statutes could have had any relation whatsoever to States. By section 3233 we find:

"Every person engaged in any trade or business on which a special tax is imposed by law, shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same and their places of residence shall be so registered."

Shall we suppose that the law ever contemplated that a State should register with the collector of a district its "name or style, place of residence, trade or business, and the place

where such trade or business is to be carried on"? The idea seems preposterous.

Again, section 3239, as amended in 1877, requires that—

"Every person engaged in any business, avocation or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of such special tax; and any person who shall through negligence fail to so place and keep said stamps, shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the cost of prosecution; but in no case shall said penalty be less than $10.00. And where the failure to comply with the foregoing provision of the law shall be through wilful neglect or refusal, then the penalty shall be double the amount above prescribed."

Shall we consider that a State is a person engaged in any business, avocation, or employment except that of government? Shall we believe that it was the intention of Congress to make it liable for the negligence of its agents in failing to keep stamps in a conspicuous place in its dispensaries? Shall we conceive that a State can be guilty of wilful neglect or refusal, subjecting it to condign punishment at the hands of the Federal Government? Surely to entertain such ideas is to be prepared to overturn all our theories of constitutional government.

Again, we find under section 3242, supplemented and enlarged by the act of February 8, 1875, chapter 36, section 16, that any person who shall carry on the business, among other things, of a wholesale or retail liquor dealer without having paid a special tax shall be fined not less than $100 nor more than $5,000, and imprisoned not less than thirty days nor more than two years. While it becomes physically impossible to confine a State in jail, it is, of course, feasible to commit its representatives to the custody of the law; but can we believe that Congress intended that a State, whether administering a police function or not, selling liquor through

its dispensaries, should for an infraction of law be subject through its agents to indictment and fine? What theory could be imagined more subversive of the orderly processes of government than this?

It is suggested in the opinion of the Court of Claims in this case that we are seeking to import into the statute an exception not contained therein. This is, we think, an entirely erroneous statement of the issue. We are not seeking to import anything into the statute. We insist upon the statute as it stands, but the Government, in order to set up a defense, seeks by construction to find in the statute the word "State," and, so finding, to escape the consequences of this action. The most that could be said for the position of the Government is that the present is a case of *casus omissus*, and, under the decisions of this court, it is without power to supply a lacking word.

In the case of Denn *vs.* Reid, 10 Peters, 527, the court says:

"It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

(Cited with approval in Bate Refrigerating Company *vs.* Sulzberger, 157 U. S. 37.)

So in Board of Lake County Commissioners *vs.* Rollins, 130 U. S., 662, it was held:

"If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

In conclusion, we urge that the question as to whether the dispensary law of South Carolina is a just exercise of the governmental powers of that State is entirely unimportant until this court shall first decide that the internal-revenue

laws have reference to the conduct of a State, and, submitting as we do that the statute is clear and unequivocal and never was intended to refer to States, an extensive discussion of the general functions of government or the relations between the State governments and the United States Government becomes unimportant.

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